

The Judicial Council

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOTICE

Notice is hereby given that the Judicial Council for the District of Columbia Circuit, pursuant to 28 U.S.C. §§ 332(d)(1) and 372(c)(11), proposes the following amendments to the Rules of the Judicial Council for the District of Columbia Circuit Governing Complaints of Judicial Misconduct or Disability.

The revisions remedy a discrepancy between the Rules of the Judicial Council for the District of Columbia Circuit Governing Complaints of Judicial Misconduct or Disability and the Rules of the Judicial Conference of the United States for the Processing of Petitions for Review of Circuit Council Orders under the Judicial Conduct and Disability Act regarding the deadline for petitions for Conference review of Circuit Council orders.

OPPORTUNITY FOR COMMENT

Comments on the proposed amendments may be submitted to the Court's Advisory Committee on Procedures within 30 days from the date of the publication of this Notice in the *Daily Washington Law Reporter*. Written comments may be sent to:

Maureen Mahoney, Esq., Chair
Advisory Committee on Procedures
c/o Latham & Watkins
555 11th Street, N.W.
Washington, DC 20004

The Committee will consider any comments received from interested parties and organizations. It will then formulate recommendations to the Judicial Council. When the Committee transmits its recommendations to the Judicial Council for consideration, it will likewise send to the Judicial Council copies of all comments which it has received.

For the Judicial Council:

/s/ Mark J. Langer
Mark J. Langer, Clerk
United States Court of Appeals

Issued: April 23, 2001

Rule 14. Action by Judicial Council

(a) Purpose of judicial council consideration. After receipt of a report of a special committee, the judicial council will determine whether to dismiss the complaint, conclude the proceeding on the ground that corrective action has been taken or that intervening events make action unnecessary, refer the complaint to the Judicial Conference of the United States, or order corrective action.

(b) Basis of council action. Subject to the rights of the judge to submit argument to the council as provided in rule 15(a), the council may take action on the basis of the report of the special committee and the record of any hearings held. If the council finds that the report and record provide an inadequate basis for decision, it may (1) order further investigation and a further report by the special committee or (2) conduct such additional investigation as it deems appropriate.

(c) Dismissal. The council will dismiss a complaint if it concludes that --

(1) the claimed conduct, even if the claim is true, is not "conduct prejudicial to the effective and expeditious administration of the business of the courts" and does not indicate a mental or physical disability resulting in an inability to discharge the duties of office;

(2) the complaint is directly related to the merits of a decision or procedural ruling;

(3) the facts on which the complaint is based have not been demonstrated; or

(4) the complaint is otherwise not appropriate for consideration under the statute.

(d) Conclusion of the proceeding on the basis of corrective action taken. The council will conclude the complaint proceeding if it determines that appropriate action has already been taken to remedy the problem identified in the complaint, or that intervening events make such action unnecessary.

(e) Referral to Judicial Conference of the United States. The judicial council may, in its discretion, refer a complaint to the Judicial Conference of the United States with the council's recommendations for action. It is required to refer such a complaint to the Judicial Conference of the United States if the council determines that a circuit judge or district judge may have engaged in conduct that --

(1) might constitute ground for impeachment; or

(2) in the interest of justice, is not amenable to resolution by the judicial council.

(f) Order of corrective action. If the complaint is not disposed of under paragraphs (c) through (e) of this rule, the judicial council will take other action to assure the effective and

expeditious administration of the business of the courts. Such action may include, among other measures --

(1) Censuring or reprimanding the judge, either by private communication or by public announcement;

(2) Ordering that, for a fixed temporary period, no new cases be assigned to the judge;

(3) In the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of removal proceedings pursuant to 28 U.S.C. § 631(i);

(4) In the case of a bankruptcy judge, removing the judge from office pursuant to 28 U.S.C. § 152;

(5) In the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements will be waived;

(6) In the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under 28 U.S.C. § 372(b) so that an additional judge may be appointed.

(g) Combination of actions. Referral of a complaint to the Judicial Conference of the United States under paragraph (e) or to a district court under paragraph (f)(3) of this rule will not preclude the council from simultaneously taking such other action under paragraph (f) as is within its power.

(h) Recommendation about fees. Upon the request of a judge whose conduct is the subject of a complaint, the judicial council may, if the complaint has been finally dismissed, recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge during the investigation, which would not have been incurred but for the requirements of 28 U.S.C. § 372(c) and these rules.

(i) Notice of action of judicial council. Council action will be by written order. Unless the council finds that, for extraordinary reasons, it would be contrary to the interests of justice, the order will be accompanied by a memorandum setting forth the factual determinations on which the order is based and the reasons for the council action. The memorandum will not include the name of the complainant or of the subject judge. The order and the supporting memorandum will be provided to the complainant, the judge, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2). However, if the complaint has been referred to the Judicial Conference of the United States pursuant to paragraph (e) of this rule and the council determines that disclosure would be contrary to the interests of justice, such disclosure need not be made. The complainant and the judge will be notified of any right to seek review of the judicial council's decision by the Judicial Conference of the

United States and of the procedure for filing a petition for review.

(j) Public availability of council action. Materials related to the council's action will be made public at the time and in the manner set forth in rule 17.

(k) Allegations of criminal conduct. If a judicial council dismisses, solely for lack of jurisdiction under 28 U.S.C. § 372(c), non-frivolous allegations of criminal conduct by a judge, the judicial council's order of dismissal shall inform the complainant that the dismissal does not prevent the complainant from bringing any allegation of criminal conduct to the attention of appropriate federal or state criminal authorities. If, in this situation, the allegations of criminal conduct were originally referred to the circuit by a Congressional committee or member of Congress, the judicial council -- if no petition for review of the dismissal by the Judicial Conference lies under 28 U.S.C. § 372(c)(10), or if no petition for review is filed ~~within the thirty-day period specified by rule 17(d)~~ **within the sixty-day period specified by rule 6 of the Rules of the Judicial Conference of the United States for the Processing of Petitions for Review of Circuit Council Orders under the Judicial Conduct and Disability Act** -- shall notify the Congressional committee or member that the Judiciary has concluded that it lacks jurisdiction under § 372(c).

COMMENTARY ON RULE 14

Basis of Council Action

Section 372(c)(6)(A) states that, upon receipt of a report from a special committee, the judicial council may conduct any additional investigation that it considers to be necessary. In our view, an investigation of any magnitude by the entire judicial council would be warranted in only the rarest cases, since it would constitute a substantial drain on judicial resources of the circuit. There may be some cases, however, in which a loose end can be tied up without the necessity of a remand.

Council Action

Paragraphs (6)(B), (6)(C) and (7) of section 372(c) enumerate actions that the council may take after receipt of the report of a special committee and the conduct of any additional investigation that it deems necessary. There are two notable omissions from this statutory enumeration: conclusion of the proceedings on the ground that corrective action has been taken, and conclusion of the proceedings on the ground that action on the complaint is no longer necessary because of intervening events. Moreover, the authority to take these actions does not easily fit into the catch-all clause of paragraph (6)(B)(vii) ("ordering such other action as it considers appropriate under the circumstances"), since the general introductory language of paragraph (6)(B) seems to assume that a finding of misconduct or disability has been made. That language authorizes the judicial council to "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit." We nevertheless conclude that conclusion of the proceeding on the basis of corrective action taken and conclusion of the proceeding because intervening events

have made action on the complaint unnecessary must be considered action permitted under paragraph (6)(B)(vii). In these rules, they are included in the enumerated alternatives for council action.

Combination of Actions

Rule 14(g) states that referral of a complaint to the Judicial Conference of the United States, or to a district court in a case involving a magistrate judge, will not preclude the judicial council from simultaneously taking other action to assure the effective and expeditious administration of the business of the courts.

Referral to the Judicial Conference of the United States may take place under either clause (A) or clause (B) of section 372(c)(7). Clause (A) states that, "[i]n addition to the authority [to take appropriate action] granted under paragraph (6)," judicial councils may, in their discretion, refer matters to the Judicial Conference of the United States with recommendations for action by the Conference. Clause (B) mandates judicial council referral of complaints to the Judicial Conference in certain circumstances; it is not introduced with the phrase, "In addition to the authority granted under paragraph (6)." We do not believe that this distinction in the introductory language was intended to suggest a difference in the authority of the judicial council to take corrective action simultaneously with referral of a matter to the Conference. We read "In addition to" in clause (A) as saying no more than such a referral is another action within the council's authority, in addition to those actions listed in paragraph (6).

Attorneys' Fees

Section 372(c)(16), as amended by section 402(h) of the Judicial Discipline and Removal Reform Act of 1990, makes explicit the authority of the judicial council, upon the request of the judge who is the subject of the complaint, to recommend to the Director of the Administrative Office of the United States Courts that the judge who is the subject of the complaint be reimbursed for reasonable expenses, including attorneys' fees, incurred during the investigation. Under the statutory provision, the judicial council has the authority to recommend such reimbursement only where, after investigation by a special committee, the complaint has been finally dismissed under section 372(c). Accordingly, there is no basis in the statute for a recommendation of reimbursement for attorneys' fees where the judicial council, after an investigation, concludes the proceeding under section 372(c)(6)(B)(vii) on the ground that corrective action has been taken or that intervening events have made action on the complaint unnecessary.

Notice of Council Action

Rule 14(i) requires that council action normally be supported with a memorandum of factual determinations and reasons and that notice of the action be given to the complainant and the subject judge. The two "interests of justice" exceptions are derived from 28 U.S.C. § 372(c)(7)(C) and (c)(15). It is not easy to imagine cases in which they would be applicable.

Right to Petition for Review of Judicial Council Action

Rule 14(i) requires that the notification to the complainant and the subject judge include notice of any right to petition the Judicial Conference of the United States for review of the council's decision.

It is noted that the right to petition for review is limited to orders under paragraph (6) of section 372(c). A decision of the council to refer a matter to the Judicial Conference under paragraph (7) is not reviewable.

~~For the same reason that we believe there should be a time limit for petitioning for review of a chief judge's order, we believe that there should be a time limit for filing a petition with the Judicial Conference Committee for review of a decision of the judicial council. We have not included such a limit in these rules, however. We believe that it would more appropriately be included in rules prescribed by the Judicial Conference governing petitions for review addressed to its standing committee.~~

Rule 17. Public Availability of Decisions

(a) General rule. A docket-sheet record of orders of the chief judge and the judicial council and the texts of any memoranda supporting such orders and any dissenting opinions or separate statements by members of the judicial council will be made public when final action on the complaint has been taken and is no longer subject to review.

(1) If the complaint is finally disposed of without appointment of a special committee, or if it is disposed of by council order dismissing the complaint for reasons other than mootness or because intervening events have made action on the complaint unnecessary, the publicly available materials will not disclose the name of the subject judge without his or her consent.

(2) If the complaint is finally disposed of by censure or reprimand by means of private communication, the publicly available materials will not disclose either the name of the subject judge or the text of the reprimand.

(3) If the complaint is finally disposed of by any other action taken pursuant to rule 14(d) or (f) except dismissal because intervening events have made action on the complaint unnecessary, the text of the dispositive order will be included in the materials made public, and the name of the judge will be disclosed, unless the council determines that such disclosure would be contrary to the purpose of the statute.

(4) At any time after the appointment of a special committee, if the complaint is dismissed as moot or because intervening events have made action on the complaint unnecessary, the judicial council will determine whether the name of the judge is to be disclosed. The name of the complainant will not be disclosed in materials made public under this rule unless the chief judge orders such disclosure.

(b) Manner of making public. The records referred to in paragraph (a) will be made public by placing them in a publicly accessible file in the office of the clerk of the court of appeals, U.S. Courthouse, 333 Constitution Avenue, N.W., Washington, D.C. 20001. The clerk will send copies of the publicly available materials to the Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, 1 Columbus Circle, N.E., Washington, D.C. 20002-8003, where such materials will also be available for public inspection. In cases in which memoranda appear to have precedential value, the chief judge may cause them to be published.

(c) Decisions of Judicial Conference standing committee. To the extent consistent with the policy of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, opinions of that committee about complaints arising from this circuit will also be made available to the public in the office of the clerk of the court of appeals.

(d) ~~Special rule for decisions of judicial council. When the judicial council has~~

~~taken final action on the basis of a report of a special committee, and no petition for review has been filed with the Judicial Conference within thirty days of the council's action, the materials referred to in paragraph (a) will be made public in accordance with this rule as if there were no further right of review.~~

~~——(e) Complaints referred to the Judicial Conference of the United States.~~ If a complaint is referred to the Judicial Conference of the United States pursuant to rule 14(e), materials relating to the complaint will be made public only as may be ordered by the Judicial Conference.

COMMENTARY ON RULE 17

Section 372(c)(15) provides that "[e]ach written order to implement any action under paragraph (6)(B) of this subsection" shall be made publicly available and that, "[u]nless contrary to the interest of justice," each such order shall be accompanied by written reasons. Section 372(c)(14) states that "papers, documents, and records of proceedings related to investigations" shall be confidential. Section 372(c)(6)(B) lists, among possible council actions following an investigation, censure or reprimand "by means of private communication" or "by means of public announcement." These three provisions exhaust the statutory guidance with respect to public availability of decisions on complaints.

The statute and its legislative history exhibit a strong policy goal of protecting judges from the damage that could be done by publicizing unfounded allegations of misconduct. Except in cases in which the proposed Court on Judicial Conduct and Disability held a de novo hearing, the Senate-passed bill specifically provided for confidentiality at all stages of the complaint procedure "unless final adverse action is taken against a judge, not including an order of dismissal."¹ Although the language of the final legislation is derived from the House bill² and is limited to materials "related to investigations," there is no indication that nonconfidential treatment of other materials was contemplated.

We believe that it is consistent with the congressional intent to protect a judge from public disclosure of a complaint, both while it is pending and after it has been dismissed if that should be the outcome. On the other hand, the goal of assuring the public that the disciplinary mechanism is operating satisfactorily is better served by making the process more open. Perhaps even more important, publication of some of the chief judges' dismissal orders--as contrasted with mere public availability--would surely improve the operation of the mechanism.

Rule 17 attempts to accommodate these conflicting interests. It provides for public

¹ S. 1873, 96th Cong., 1st Sess. § 2(a) (1979) (proposed 28 U.S.C. § 372(n)(1)(C)); see S. Rep. No. 362, 96th Cong., 1st Sess. 16 (1979).

² H.R. 7974, 96th Cong., 2d Sess. § 3(a) (1980) (proposed 28 U.S.C. § 372(c)(14)).

availability of decisions of the chief judge and the judicial council, and the texts of any memoranda supporting their orders, together with any dissenting opinions or separate statements by members of the judicial council. However, these orders and memoranda are to be made public only when final action on the complaint has been taken and any right of review has been exhausted. Whether the name of the judge is disclosed will then depend upon the nature of the final action. If the final action is an order predicated on a finding of misconduct or disability (other than censure or reprimand by means of private communication) the name of the judge will be made public. If the final action is dismissal of the complaint, or a conclusion of the proceeding by the chief judge on the basis of corrective action taken, the name of the judge will not be disclosed.

If a complaint is dismissed as moot or because intervening events have made action on the complaint unnecessary, after appointment of a special committee, rule 17(a)(4) leaves it to the judicial council to determine whether the judge will be identified. In such a case, no final decision has been reached on the merits, but it may be in the public interest--particularly if a judicial officer resigns in the course of an investigation--to make the identity of the judge known.

It should be noted that rule 17 provides for different treatment where a proceeding is concluded on the basis of corrective action taken, depending on whether the proceeding is concluded by the chief judge or by the council following investigation by a special committee. If a chief judge concludes a proceeding on that basis, rule 17(a)(1) provides that the name of the judge will not be disclosed. Shielding the name of the judge in this circumstance should contribute to the frequency of this kind of informal disposition. Once a special committee has been appointed, and a proceeding is concluded by the full council on the basis of corrective action taken, rule 17(a)(3) provides for disclosure of the name of the judge or magistrate. An "informal" resolution of the complaint at this stage is likely to look very much like any other council order, and should be disclosed in the same manner.

~~The proposal that decisions be made public only after final action has been taken is designed in part to avoid disclosure of the existence of pending proceedings. Because the Judicial Conference has not established a deadline for filing petitions for review with the Committee to Review Judicial Council Conduct and Disability Orders, rule 17(d) provides for making decisions public if thirty days have elapsed without the filing of a petition for review.~~

We note that public availability of orders under 28 U.S.C. § 372(c)(6)(B) is a statutory requirement. The statute does not prescribe the time at which these orders must be made public, but it is implicit that it should be without delay. Similarly, the statute does not state whether the name of the judge must be disclosed. In view of the legislative interest in protecting a judge from public airing of unfounded charges, we think that the law is reasonably interpreted as permitting nondisclosure of the identity of a judicial officer who is ultimately exonerated and also permitting delay in disclosure until the ultimate outcome is known. In this connection congressional leaders described the public availability requirement as applying

to "sanctioning orders."³

Finally, the rule provides that the identity of the complainant will be disclosed only if the chief judge so orders. Identifying the complainant when the judge is not identified would of course increase the likelihood that the identity of the judge would become publicly known, thus thwarting the policy of nondisclosure. If the identity of the complainant is not to be made public in such cases, there is no particular reason to change the rule and make it public routinely in cases in which the judge is identified. However, it may not always be practicable to shield the complainant's identity while making public disclosure of the judicial council's order and supporting memoranda; in some circumstances, moreover, the complainant may consent to public identification.

In all instances the judge or magistrate complained of can consent to waiver of his or her confidentiality. This will allow the chief judge or the council, as the case may be, to appropriately respond to publicity engendered by the complainant.

³ 126 Cong. Rec. 28,093 (1980) (remarks of Sen. DeConcini); id. at 28,617 (remarks of Rep. Kastenmeier).

Rule 18. Disqualification

(a) Complainant. If the complaint is filed by a judge, that judge will be disqualified from participation in any consideration of the complaint except to the extent that these rules provide for participation by a complainant. A chief judge who has identified a complaint under rule 2(j) will not be automatically disqualified from participating in the consideration of the complaint but may consider in his or her discretion whether the circumstances warrant disqualification.

(b) Judge complained about. A judge whose conduct is the subject of a complaint will be disqualified from participating in any consideration of the complaint except to the extent that these rules provide for participation by a subject judge.

(c) Disqualification of chief judge on consideration of a petition for review of a chief judge's order. If a petition for review of a chief judge's order dismissing a complaint or concluding a proceeding is filed with the judicial council pursuant to rule 5, the chief judge will not participate in the council's consideration of the petition. In such a case, the chief judge may address a written communication to all of the members of the judicial council, with copies provided to the complainant and to the subject judge. The chief judge may not communicate with individual council members about the matter, either orally or in writing.

(d) Member of special committee not disqualified. A member of the judicial council who is appointed to a special committee will not be disqualified from participating in council consideration of the committee's report.

(e) Judge under investigation. Upon appointment of a special committee, the subject judge will automatically be disqualified from serving on (1) any special committee appointed under rule 4(e), (2) the judicial council of the circuit, (3) the Judicial Conference of the United States, and (4) the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States. The disqualification will continue until all proceedings regarding the complaint are finally terminated, with no further right of review. ~~The proceedings will be deemed terminated thirty days after the final action of the judicial council if no petition for review has at that time been filed with the Judicial Conference.~~

(f) Substitute for disqualified chief judge. If the chief judge of the circuit is disqualified from participating in consideration of the complaint, the duties and responsibilities of the chief judge under these rules will be assigned to the circuit judge in regular active service who is the most senior in date of commission for those who are not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to refer the complaint to a circuit judge from another circuit pursuant to 28 U.S.C. § 291(a), or whether it is necessary, appropriate, and in the interest of sound judicial administration to permit the chief judge to dispose of the complaint on the merits. Members

of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the judicial council.

(g) Multiple disqualifications on petition for review.

(1) Whenever the number of council members disqualified from consideration of a petition for review reduces the number of members qualified to fewer than seven, active judges of the court of appeals and district court, not currently serving on the council, shall be designated as temporary members of the council in sufficient numbers to permit at least seven council members to act on the petition.

(2) Designation of temporary members shall be made equally from each court, in order of seniority by date of commission, provided that the judges of the circuit court of appeals shall comprise a majority of the council members (regular and designated) acting on the petition, unless the number of circuit judges qualified to act are insufficient to comprise a majority. In that event, district judges may comprise a majority.

(3) If, after all qualified active judges of the court of appeals and district court have been designated for temporary council membership, the number of council members remains fewer than seven, the Chief Judge of the circuit shall request that the Chief Justice designate, pursuant to 28 U.S.C. §§ 291(a) and 292(d), circuit and district judges of other circuits for temporary assignment to this circuit. The Chief Judge shall indicate that the judges so designated shall serve as temporary members of the circuit judicial council for purposes of acting on the petition for review, and shall request designation of judges in sufficient number to permit the council to act on the petition with at least seven members.

COMMENTARY ON RULE 18

Disqualification of Chief Judge on Review of Chief Judge's Order

Whether the chief judge should participate in decisions on petitions to the circuit council is a question that has engendered some disagreement. Rule 18(c) would bar such participation. We believe that such a policy is best calculated to assure complainants that their petitions will receive fair consideration.

Disqualification of Judge Under Investigation

~~—— 28 U.S.C. § 372(c)(12) states that a judge under investigation will be disqualified from certain activities "until all related proceedings under this subsection have been finally terminated." Rule 18(e) provides that the proceedings will be deemed terminated if no petition for review is filed within thirty days after the final action of the judicial council. We believe it would be preferable for the Judicial Conference to promulgate a rule to deal with this issue.~~

Substitute for Disqualified Chief Judge

Under 28 U.S.C. § 372(c)(2), a complaint against the chief judge is to be handled by "that circuit judge in regular active service next senior in date of commission." This language is read in some circuits as requiring that the substitute judge be junior "in date of commission" to the chief judge; in others it is read as simply a statement that seniority among judges other than the chief is to be determined by date of commission, with the result that complaints against the chief judge may be routed to a former chief judge or other judge who was appointed earlier than the chief judge. Although the former interpretation probably has a slight grammatical edge, rule 18(f) adopts the latter. We are aware of no evidence that Congress intended to depart from the normal order of precedence.